Supreme Court, U.S.
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No. 92-1747

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN APPELL, PETITIONER

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITON

DREW S. DAYS, III
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT V. ZENER
DEBORAH RUTH KANT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether petitioner, a government employee, has a cause of action under the Rehabilitation Act of 1973, other federal statutes, or the Constitution, based on his allegation that the government failed to promote him because he was not handicapped.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 2a-4a) and the district court (Pet. App. 5a-9a) are unpublished, but the judgment of the court of appeals is noted at 984 F.2d 1255 (Table).

JURISDICTION

The decision of the court of appeals was filed on February 1, 1993. The petition for a writ of certiorari was filed on May 3, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Justice's Civil Rights Division employed petitioner, a nonhandicapped white male, as a program analyst. In 1984, the Division selected James Bennett, an equal opportunity specialist, rather than petitioner, for the position of Supervisory Program Analyst. Pet. xxvi. Thereafter, alleging that he was treated less favorably because he was not handicapped, petitioner filed suit claiming a right to relief under the Rehabilitation Act of 1973, 29 U.S.C. 794; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 1983; 28 U.S.C. 1331 and 1343; and the Constitution.

2. The district court dismissed the complaint for failure to state a claim. Pet. App. 5a-9a. The court concluded that the plain language of the Rehabilitation Act provides a cause of action for discrimination only to individuals with handicaps. Pet. App. 6a-7a. See 29 U.S.C. 794(a). The court also held that respondent's hiring decision did not violate the Constitution, explaining that plaintiff was not a member of a suspect class for purposes of the guarantee of equal protection of the laws. Pet. App. 7a. The district court further held that neither Title VII, 28 U.S.C. 1331 and 1343, nor 42 U.S.C. 1983, afforded a basis for petitioner's claim. It explained that petitioner alleged no discrimination based on "race, color, religion, sex, or national origin," as Title VII requires, 42 U.S.C. 2000e-16(a), and did not claim that respondent acted "under color of state law" for purposes of 42 U.S.C. 1983. Finally, the court observed that 28 U.S.C. 1331 and 1343 supply no independent cause of action for a claim of reverse discrimination, but only confer general subject-matter jurisdiction over other claims. Pet. App. 7a-8a.

3. The court of appeals affirmed. Pet. App. 2a-3a. It first expressed agreement with the district court's

holding that, since petitioner has no handicap, the Rehabilitation Act does not provide him with a cause of action. *Id.* at 3a. Noting that handicapped persons do not constitute a suspect class for purposes of the constitutional guarantee of equal protection, the court of appeals stated that "the classification at stake" is not "an irrational one when measured by the Constitution's equal protection constraint." *Ibid.*

ARGUMENT

Petitioner alleges that the Department of Justice's rejection of him in favor of a handicapped individual for a supervisory position violated the Rehabilitation Act, various other statutes, and the constitutional guarantee of equal protection of the laws. The courts below correctly disposed of this case, and it does not warrant further review.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with handicaps in the United States * * * shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination" in federal programs and activities. 29 U.S.C. 794(a); see also 29 U.S.C. 791. In addition, the Act directs federal agencies to develop affirmative action plans to ensure "adequate hiring, placement, and advancement opportunities for individuals with handicaps." 29 U.S.C. 791(b). By its terms, the Act does not protect nonhandicapped individuals from so-called "reverse discrimination," nor does it dictate that federal agencies make employment decisions that do not take a person's handicaps into account. In this respect, the Rehabilitation Act differs from Title VII, which expressly provides that federal agency personnel actions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a).

With respect to the constitutional guarantee of equal protection, this Court has held that "reverse discrimination" may run afoul of the Constitution if based on suspect classifications such as race. See, *e.g.*, *Shaw* v. *Reno*, No. 92-357 (June 28, 1993), slip op. 19; *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment). No court has ever held, however, that possession of a handicap—or more precisely as regards petitioner, the *non*-possession of a handicap—defines a "suspect class," or that statutory distinctions based on handicap are subject to a standard more exacting than the "rational basis" test. See *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 725 (10th Cir. 1988), cert. denied, 111 S. Ct. 799 (1991); *Brown* v. *Sibley*, 650 F.2d 760, 766 (5th Cir. 1981); see also *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mental retardation is not suspect classification calling for more exacting standard of review than that normally accorded economic and social legislation).

Petitioner does not allege that the handicapped individual selected for the position he sought was not fully qualified. Moreover, even assuming that the employment decision here took into account the selectee's handicap, use of that factor is not irrational, since it advances the legitimate governmental objective of ensuring the availability of "adequate hiring, placement, and advancement opportunities for individuals with handicaps," 29 U.S.C. 791(b), and thereby promoting their economic independence and participation in all aspects of life.

Finally, as the courts below correctly held, see Pet. App. 3a; 7a-8a, the other statutes upon which petitioner relies—28 U.S.C. 1331 and 1343, 42 U.S.C. 1983, and 42 U.S.C. 2000e-16(a)—provide no independent cause of action based on the allegations in his complaint. Title VII does not prohibit discrimination on the basis of handicap,

and petitioner has made no claim of deprivation of rights under color of state law, as required by 42 U.S.C. 1983. Finally, neither 28 U.S.C. 1331 nor 28 U.S.C. 1334 provides an independent cause of action. Each only confers jurisdiction over actions arising under other federal statutes or the Constitution. Because petitioner has no statutory or constitutional claim, those provisions do not help him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT V. ZENER
DEBORAH RUTH KANT
Attorneys

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